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IN THE
SUPREME COURT OF THE UNITED STATES

No. 89-7691

October Term 1989

Dale Robert Yates,

Petitioner,

vs

James Aiken, Warden, Central Correctional Institution, and the Attorney General of South Carolina,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I.

DOES THE SOUTH CAROLINA SUPREME COURT'S "HARMLESS ERROR ANALYSIS" IN THIS CASE COMPORT WITH THE MANDATES OF THIS COURT'S DECISION IN YATES V. AIKEN, 484 U.S. 211 (1988) AND ROSE V. CLARK, 478 U.S. 570 (1986)?

II.

SHOULD THIS COURT GRANT CERTIORARI IN THIS CASE WHERE THE HARMLESS ERROR ANALYSIS PERFORMED BY THE SOUTH CAROLINA SUPREME COURT FULLY COMPLIES WITH THIS COURT'S MANDATES IN YATES V. AIKEN, 484 U.S. 211 (1988) AND ROSE V. CLARK, 478 U.S. 570 (1986)?

III.

SHOULD THIS COURT GRANT CERTIORARI TO CORRECT OR CLARIFY THE HARMLESS ERROR ANALYSIS PERFORMED BY THE SOUTH CAROLINA SUPREME COURT?

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Respondents, above named, make Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina in Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989).

ORDER BELOW

The decision of the Supreme Court of South Carolina dated February 6, 1989, is reported at Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). This matter came before the Supreme Court of South Carolina pursuant to this Court's decision in Yates v. Aiken, 484 U.S. 211 (1988).

JURISDICTION

The Respondent concurs in the statement of jurisdiction presented in the Petitioner's Petition for Writ of Certiorari and

submits that this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life ... without due process of law ... .

2. This case also involves S.C. Code Ann. §16-3-10 (1984 Cumm. Supp.), which provides:

> Murder is the killing of any person with malice aforethought, either express or implied.

PROCEDURAL HISTORY

On or about February 13, 1981, the Petitioner, Dale Robert Yates, was arrested and charged with murder, armed robbery, assault and battery with intent to kill and conspiracy to commit armed robbery. The Petitioner was subsequently indicted at the April, 1981, term of the Greenville County Grand Jury. He was indicted for the aforementioned offenses and his case was called to trial on April 27, 1981, before the Honorable C. Anthony Harris, Circuit Judge, and a jury. The jury convicted Petitioner on all charges. In the sentencing phase of Petitioner's bifurcated trial, the jury sentenced him to death on May 2, 1981. The Petitioner then filed a timely Notice of Intent to Appeal in the South Carolina Supreme Court. His conviction and sentence was subsequently affirmed in State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982). Thereafter, the Petitioner petitioned this

Court for a Writ of Certiorari which was denied in Yates v. South Carolina, 462 U.S. 1124 (1983).

The Petitioner then filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court challenging a jury instruction on malice that was not objected to or ruled on in the trial court nor raised in the direct appeal or pursuant to the State's Uniform Post-Conviction Relief Statute, S.C. Code Ann. §17-27-10, et seq. (1976). The Petitioner made a Petition for Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court, which consolidated the Petition along with a pending appeal on a Post-Conviction Relief Application that was presented to the State Supreme Court in which there was no challenge to the malice instruction. After the State made its Return to the Petition, the Supreme Court of South Carolina denied and dismissed both the appeal based on the State's Post-Conviction Relief Application and a Writ of Habeas Corpus in the original jurisdiction of the State Supreme Court.

The Petitioner once again petitioned this Court for a Writ of Certiorari to the Supreme Court of South Carolina. This Court granted the Petition for Writ of Certiorari stating that "[t]he judgment is vacated and the case is remanded to the Supreme Court of South Carolina for further consideration in light of Francis v. Franklin, 471 U.S. 307 (1985)." Yates v. Aiken, 474 U.S. 896 (1985). On remand to the Supreme Court of South Carolina, it was once again noted by the South Carolina Supreme Court that "[n]o objection to the charge was made, and the issue was not raised on

direct appeal." Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84, 85 (1986). However, the South Carolina Supreme Court went on to rule that it would not retroactively apply its decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), to the charge in this particular case. On remand from this Court, the Supreme Court of South Carolina in essence ruled that the Petitioner was not entitled to the retroactive benefit of a different malice charge.

Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). Once again, the Petitioner petitioned this Court for a Writ of Certiorari. In Yates v. Aiken, 484 U.S. 211 (1988), this Court remanded this case to the South Carolina Supreme Court "for further proceedings not inconsistent with this opinion." Yates v. Aiken, 484 U.S. at 212.

On remand, the Supreme Court of South Carolina analyzed this case both in light of this Court's mandates in Yates v. Aiken, 484 U.S. 211 (1988) and the decision of this Court in Rose v. Clark, 478 U.S. 570 (1986). Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). On remand, the Supreme Court of South Carolina found that the improper malice instruction was harmless pursuant to this Court's opinion in Rose v. Clark, supra. Initially, the South Carolina Supreme Court issued an unpublished opinion in this matter on June 6, 1988. (Petitioner's Appendix, A-1). However, the Petitioner subsequently filed a Petition for a Rehearing in the South Carolina Supreme Court. Pursuant to the Petition for Rehearing, the South Carolina Supreme Court issued a slightly modified opinion on January 29, 1990. Yates v. Aiken,

___ S.C. ___, 391 S.E.2d 530 (1989). It is from this decision that the Petitioner now appeals.

STATEMENT OF FACTS

The overwhelming, if not the only, evidence in the record reveals that the Petitioner agreed, planned and conspired with Henry Davis and David Loftis to perpetrate burglaries and/or robberies in the Greenville County area, which included the store in question where the crime occurred. The testimony in this regard is not merely overwhelming but it is supported by the Petitioner's own testimony at trial. In fact, at trial the Petitioner admitted that some ten days prior to the incident in question he along with David Loftis or Henry Davis, or both men, were planning and conspiring to carry out burglaries in the Greenville County area. (Tr. p. 808, line 2 - p. 832, line 9; Tr. p. 1061, lines 4-18; Tr. p. 1065, line 11 - p. 1069, line 14; Tr. p. 1109, line 14 - p. 1110, line 11; Tr. p. 1111, line 21 - p. 1113, line 17; Tr. p. 1115, lines 1-25). As this testimony reveals, on February 12, 1981, David Loftis, Henry Davis and Petitioner, Dale Yates, talked about various places to rob. (Tr. p. 813, lines 21-24; Tr. p. 815, lines 5-12). This testimony further reveals that it was the Petitioner who acquired the pistol which was to be used in the robbery. The testimony of both Petitioner and David Loftis indicates that the Petitioner obtained the gun from his brother. (Tr. p. 816, line 23 - p. 819, line 10). The three men spent the night of February 12th together in the same apartment. On the following morning of February 13, 1981, all three men drove around the Greenville

County area in the same car checking out various stores for the possibility of committing an armed robbery. While riding around, David Loftis testified that he told Davis and the Petitioner that if they were caught, they could receive a substantial sentence for armed robbery and possibly the electric chair if someone were killed. (Tr. p. 820, line 20 - p. 825, line 14). The three men were unable to agree on a particular place to rob that morning.

However, at approximately 3:00 p.m. in the afternoon, Henry Davis and the Petitioner left David Loftis at a nearby mall, because he wished to visit his girlfriend who worked there. Petitioner and Davis drove away with the pistol under the passenger side of the front seat. (Tr. pp. 828-829). The overwhelming testimony in the record indicates that the Petitioner and Davis subsequently decided upon Wood's Store as a likely target for their robbery. The Petitioner himself testified that they entered Wood's Store for the purpose of committing an armed robbery. (Tr. p. 1084, line 23 - p. 1085, line 6; Tr. p. 1086, line 24 - p. 1087, line 14; Tr. p. 1092, lines 16-25). The Petitioner and Davis entered Wood's Store together. They approached Willie Wood, who was behind the counter, and demanded his money at gunpoint. Again, Petitioner was armed with a pistol, while Davis was armed with a knife. (Tr. p. 911, line 20 - p. 940, line 10). According to Petitioner's own testimony at trial, he not only walked in Wood's Store and threatened Willie Wood with a pistol, but it was Petitioner who first demanded that Willie Wood turn over all of his money. (Tr. p. 1128, line 19 - p. 1130, line 3). Davis then

made the same threat and demand while wielding his knife in a stabbing motion. Willie Wood then gave Davis approximately $3,000.00 and Davis handed the money to Petitioner. (Tr. p. 1095, lines 13-22). Davis then directed Willie Wood to bend over the store counter but Wood refused to do so after noticing Davis' stabbing motions with the knife. (Tr. pp. 914-915; Tr. p. 922, line 17 - p. 923, line 3; Tr. p. 930, lines 16-25). When Willie Wood refused Davis' demands, Yates testified that he shot Wood two times, as he stood approximately two steps or six to ten feet from the door of the store. He then left the store after determining both that Wood was unarmed and a previously unseen female was present. (Tr. pp. 1097-1098; Tr. p. 1093, lines 1-7). The overwhelming testimony in the record also indicates that as Petitioner fired the shots at Willie Wood. Mr. Wood was standing in such a way as to be facing the Petitioner with his arm outstretched toward Petitioner and his hand opened in a defensive posture. The testimony further reveals that the bullet which struck Willie Wood first struck him in the palm of his outstretched hand, passed through his hand and struck him in the chest severely injuring him. (Tr. p. 911, line 20 - p. 931, line 6; Tr. p. 951, line 10 - p. 953, line 10). As Petitioner left the store, he ran to the getaway car and entered on the passenger side. The Petitioner testified that he waited briefly for Davis, but fearing that Davis might have gotten into trouble or been caught, he moved over underneath the steering wheel and drove away alone. (Tr. p. 1098, line 7 - p. 1099, line 3).

At the time Petitioner shot Willie Wood and turned to leave

the store, it would appear that Wood attempted to go to the front of the counter and Davis attempted to go around the end of the counter in order to stop him. At this time, Willie Wood's 68-year old mother, Helen Wood, attempted to help Willie Wood by grabbing Davis. (Tr. p. 916, line 17 - p. 917, line 2; Tr. p. 922, line 17 - p. 923, line 3). A scuffle ensued between the three, and Helen Wood fell to her hands and knees. By this time, Willie Wood testified that he was able to get to a pistol which he had been wearing underneath his coat. He then shot Davis several times until Davis fell and dropped the knife to the floor. Davis was killed instantly. (Tr. p. 916, lines 3-12; Tr. p. 927 - p. 928, line 6; Tr. p. 918, line 21). Though Willie Wood was severely injured and bleeding, he saw his mother on her hands and knees and watched her die as she fell to the floor from a knife wound which had penetrated her chest and the outer wall of her heart. (Tr. p. 917, line 19 - p. 918, line 21; Tr. p. 954, line 16 - p. 955, line 23). Within seconds, other people came into Wood's Store and assisted Willie Wood with his injuries and aided him in contacting paramedics and police. (Tr. p. 886, line 24 - p. 895, line 21; Tr. p. 897, line 23 - p. 903, line 5).

Petitioner was apprehended later that afternoon after his vehicle was spotted by law enforcement authorities. (Tr. p. 961, line 18 - p. 971, line 6). The pistol and the money were also recovered and Petitioner admitted that he had attempted to hide the pistol and the money. (Tr. p. 982, line 17 - p. 987, line 10; Tr. p. 1137, line 11 - p. 1138, line 24).

THE TRIAL COURT'S INSTRUCTIONS

During the trial, the trial court, without objection, instructed the jury on murder and the elements of malice. In pertinent part, the malice charge is as follows:

> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought, and such proof must be beyond a reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words 'express' and 'implied' do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.
>
> Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.
>
> Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances

surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before the commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be the combination of the previous evil intent and the act which produces the fatal result.

(Tr. pp. 1207-1208). (Emphasis added). The trial court also gave the jury instructions concerning the "hand of one, hand of all" doctrine in South Carolina, or as it is sometimes referred to, the doctrine of accomplice liability.

> If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present, participating in the unlawful undertaking, are as guilty as the one who committed the final act. The common purpose may not have been to kill and murder, but if it was unlawful, and [if] the execution of this unlawful common purpose involves the probable contingency of taking human life, and during the commission of the unlawful purpose a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

(Tr. p. 1209, lines 7-23). The trial court also gave the jury instructions to the effect that a defendant is not responsible for a homicide committed by a co-defendant as an independent act

growing out of private malice or ill will which the slayer had toward the deceased (Tr. p. 1210):

> A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

[Tr. p. 1210, line 7 - p. 1210, line 15].

The trial court also went on to give appropriate instructions on the law of withdrawal and abandonment:

> One who is joined in a common design to kill or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw notwithstanding any attempted withdrawal from the original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with a resulting lack of responsibility for a homicide committed by a confederate.
>
> I tell you, however, that withdrawal from the scene of the crime may be considered by you

> along with the other circumstances in determining whether the Defendant had, in fact, abandoned the common design and in whether the fact of his alleged abandonment of the common purpose had been communicated to his associate.

[Tr. p. 1210, line 16 - p. 1211, line 21].

After the conclusion of the charges, trial counsel and the court had the following dialogue concerning the instruction on withdrawal:

> THE COURT: Mr. Mauldin, well, I, at no time ever intimated that you had the burden of proof. I don't think I did.
>
> MR. MAULDIN: That is correct. I don't recall any inference or statement that we did have the burden, it was simply a recitation of the fact that we might present that (withdrawal) as a defense ... .

(Tr. p. 1217). The jury convicted the Petitioner of murder, armed robbery and assault and battery with intent to kill. He was sentenced to death on the murder charge. For a detailed statement of the procedural history of this case following conviction and sentencing, see the Respondent's Procedural History, supra.

WHETHER THE FEDERAL QUESTION WAS RAISED
AND DECIDED BELOW

The present Petition for Writ of Certiorari is from the South Carolina Supreme Court's decision in Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). The South Carolina Supreme Court issued this decision pursuant to this Court's opinion in Yates v. Aiken, 44 U.S. 211 (1988). In its opinion, the Supreme Court of South Carolina addressed the issue of whether the jury instructions regarding malice improperly shifted the burden of

proof and, if so, were they harmless beyond a reasonable doubt? In its opinion, the South Carolina Supreme Court concluded that the judge's instructions regarding malice were in error; however, in light of this Court's opinion in Rose v. Clark, 478 U.S. 570 (1986), the instructions in question were harmless beyond a reasonable doubt.

WHY THE WRIT SHOULD NOT BE GRANTED

1. The South Carolina Supreme Court properly adhered to the decisions of this Court in finding the trial court's instructions to be harmless beyond a reasonable doubt.

In Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989), the South Carolina Supreme Court properly adhered to the governing precedents of this Court in following the mandates set out in Yates v. Aiken, 484 U.S. 211 (1988). In Yates v. Aiken, 484 U.S. 211 (1988), this Court rejected the retroactivity analysis of the South Carolina Supreme Court as set forth in Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). This Court reversed the judgment of the South Carolina Supreme Court and reversed and remanded for further proceedings consistent with this Court's opinion. Yates, 484 U.S. at 217. In this Court's most recent opinion on this matter, it, however, did not consider whether the challenged jury instruction was harmless beyond a reasonable doubt under Rose v. Clark, supra. Furthermore, and most important, this Court did not direct the South Carolina Supreme Court to issue the Writ of Habeas Corpus, nor did it direct that Petitioner be granted a new trial. The specific language used by this Court was that "the case is remanded for further proceedings not inconsistent with

this opinion." Yates, 484 U.S. at 217. Contrary to Petitioner's assertions, the South Carolina Supreme Court did precisely what it was directed by this Court to do.

In remanding this matter for reconsideration by the South Carolina Supreme Court, this Court in no way indicated that the State Supreme Court should have disregarded other decisions of this Court in analyzing the jury charge for error pursuant to Francis v. Franklin, 471 U.S. 307 (1985). This is especially significant in light of the fact that Francis v. Franklin did not resolve the issue of whether an erroneous charge "that shifts a burden of persuasion to the defendant on an essential element of an offense can ever be harmless." Francis, 471 U.S. at 325. This question was answered in the affirmative in this Court's decision in Rose v. Clark, a decision which the South Carolina Supreme Court was duty bound to apply to this case on remand from this Court. Because the South Carolina Supreme Court has made every effort to consider this matter in light of Francis v. Franklin, and its progeny, the South Carolina Supreme Court in no way has disregarded or violated the mandates of this Court as the Petitioner suggests.

2. The State Supreme Court conducted a proper harmless error analysis.

In conducting a harmless error analysis of a possible burden shifting presumption, the process is two-fold. First, the language of the charge itself must be examined to determine whether the specific language challenge is in error. If the specific language in question could reasonably be understood as

creating an improper presumption, then the language must be examined in light of the charge as a whole to determine whether, in context, the erroneous language is adequately explained or corrected. If the specific language is not erroneous and/or it is properly explained or corrected by other language in the charge, then the analysis ends and there is no reversible error. Francis v. Franklin, supra, and Cupp v. Naughton, 414 U.S. 141 (1973). However, if erroneous language does appear in the charge, which is not adequately explained or corrected, then the reviewing court must determine whether in light of the whole record "the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury." Rose, 478 U.S. at 580-581. As stated by a number of the Federal Courts of Appeal, "[a] Sandstrom error is harmless when the evidence of the element of the crime to which the instruction relates is so overwhelming or when that element is not in issue." Gates v. Zant, 863 F.2d 1492, 1502 (11th Cir. 1989); Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986); Burton v. Foltz, 810 F.2d 118 (6th Cir. 1987); Martin v. Foltz, 773 F.2d 711 (6th Cir. 1985); Boyen v. Kemp, 832 F.2d 546 (11th Cir. 1987); McKenzie v. Risley, 801 F.2d 1519 (9th Cir. 1986); Dickey v. Lewis, 859 F.2d 1365 (9th Cir. 1988); Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986); and Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986) affirmed in Burger v. Kemp, 483 U.S. 776 (1987).

Furthermore, it is interesting to note that the situation here is not unlike that in Burger v. Kemp, supra. In the Burger

case, this Court remanded the case for reconsideration in light of Francis v. Franklin. Pursuant to this Court's remand in Burger, the Eleventh Circuit Court of Appeals utilized a harmless error analysis and found that the challenged language was harmless beyond a reasonable doubt. This Court subsequently affirmed the decision of the Eleventh Circuit Court of Appeals. The South Carolina Supreme Court, like the Eleventh Circuit Court of Appeals, was not in error for analyzing an erroneous instruction under Rose v. Clark, when this Court had remanded for reconsideration pursuant to Francis v. Franklin.

In light of the afore-mentioned principles of law, this case presents a clear example of the harmlessness of an improper instruction on malice. First, as the South Carolina Supreme Court properly pointed out, the State sought to convict the Petitioner on the theory of accomplice liability.

> Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act, one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide.

Yates, 391 S.E.2d at 531. The facts pertaining to the Petitioner's complicity in the armed robbery and murder are overwhelming. The undisputed facts as indicated by Petitioner's own testimony indicate that he was plotting with Loftis and Davis for a period of time, as much as ten days prior to this incident, to commit various robberies and/or burglaries in the Greenville County area. Likewise, the evidence is equally overwhelming that the Petitioner plotted with Loftis and Davis on the day before

and the day of this incident to commit a robbery. That the Petitioner was a complete and total accomplice in these crimes cannot be disputed on the evidence in this record. See, Respondent's Statement of Facts, supra. Furthermore, it is undisputed but that the law in South Carolina is that in situations of accomplice liability involving murder, it is the intent of the killer which determines whether there is malice. Yates, 391 S.E.2d at 532.

The evidence is equally overwhelming regarding Henry Davis' malice at the time he stabbed Helen Wood to death. The only evidence in the record is that Henry Davis was a full accomplice and equal partner in the planning and commission of this armed robbery. Furthermore, the facts reveal that Henry Davis went into the establishment with Petitioner and actually took the money from Willie Wood. The undisputed facts in the record clearly indicate that Henry Davis got into a scuffle with Willie Wood inside the store and when Mr. Wood's mother, Helen Wood, got involved in the scuffle, she was stabbed by Davis. On the facts in this case, a juror would not have had to rely on an erroneous burden shifting presumption in order to conclusively find that Davis acted with malice. Davis' malice being, of course, the focal point for purposes of the South Carolina Law of Accomplice Liability. See, Respondent's Statement of Facts, supra.

In his Petition for Writ of Certiorari, the Petitioner argues much along the same lines as did the dissenters in the decision below. Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989). Petitioner argues that his primary defense was

withdrawal and that "he had abandoned the robbery prior to Ms. Wood's arrival on the scene, that he had communicated this abandonment to his accomplice, that he never saw Ms. Wood at the scene, and that he was not legally responsible for her death." (Petition for Writ of Certiorari, p. 11). This assertion is totally unsupported by any facts in the record. The Petitioner simply never "withdrew" from the criminal enterprise. (Tr. p. 1210, line 16 - p. 1211, line 21). There is simply no evidence in the record that the Petitioner withdrew from the criminal enterprise. To be sure, he left the store, went into the parking lot and climbed into the passenger seat of his vehicle to wait on his accomplice, Henry Davis. However, merely leaving the scene of an armed robbery after completing the theft is not withdrawal from the criminal enterprise under South Carolina law. That Petitioner never intended to withdraw from the criminal enterprise is evident by his own testimony at trial to the effect that he left the store, entered the vehicle and waited on his co-defendant, Henry Davis. (Tr. p. 1136, line 15 - p. 1137, line 21; Tr. p. 1098, line 7 - p. 1099, line 6). Petitioner's own admission at trial that he waited in the getaway car outside the store for his accomplice, Henry Davis, is conclusive evidence that the Petitioner never "withdrew" from the criminal enterprise but was still willing to aide, assist and abet Mr. Davis even after the robbery had gone awry. Had Petitioner not testified in this manner and had there been some evidence of a genuine withdrawal, then Petitioner's arguments may have merit. However, in the absence of any evidence of a withdrawal, as that term is

understood in South Carolina Law, the malice instructions were totally harmless. Because no reasonable juror could have concluded that Petitioner was not aiding and abetting Davis in the course of a criminal enterprise, and because no reasonable juror could have concluded that Davis did not act with malice in killing Helen Wood, the errors here are harmless beyond a reasonable doubt. The judgment of the Supreme Court of South Carolina is proper and is in complete accordance with the decisions of this Court.

3. Because there is no confusion or uncertainty in the appropriate harmless error analysis to apply in cases such as this, this Court should not grant certiorari.

Petitioner argues that the appropriate harmless error analysis under Rose v. Clark, 478 U.S. 570 (1986), is not clear and, therefore, this Court should take review in order to clarify that standard. This Court's holding in Rose v. Clark regarding the appropriate standard of review is clear.

> In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. [citations omitted] In that event the erroneous instruction is simply superflous: The jury has found, in Winship's words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Rose, 478 U.S. at 580-581. That this is the appropriate mode of analysis is confirmed by the decisions of a number of Federal Courts of Appeal as cited above. Furthermore, this is clearly the mode of analysis which the South Carolina Supreme Court used in this case. Yates, 391 S.E.2d at 531.

Furthermore, even assuming that Rose v. Clark contains some kind of slight ambiguity in the form of harmless error analysis to be used, it is clear that the State Supreme Court applied the stricter standard in this case. In the Petition, the Petitioner argues as follows:

> Under one interpretation of Rose v. Clark, a reviewing court must determine, in order to deem a Sandstrom violation harmless, that the predicate facts which were actually proven beyond a reasonable doubt so conclusively establish the presumed fact that the jury may actually be said to have found "'every fact necessary' to establish every element of the offense beyond a reasonable doubt." [citation omitted] However, as Justice Scalia pointed out in Carella, "[e]lsewhere ... Rose says that usual harmless error analysis is applicable: 'when a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest of fairness has been satisfied and the judgment should be affirmed.' 478 U.S. at 579." [citation omitted]

(Petition for Certiorari, pp. 15-16). Clearly, under the express terms of the South Carolina Supreme Court's decision in this case, the stricter standard was applied. Also, as evidenced in Respondent's previous argument, the decisions in the Federal Courts of Appeal seem to reflect that it is the stricter standard which is being applied.

CONCLUSION

For the reasons set forth above, the writ should be denied.

[redacted]

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June 28, 1990

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